IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 533

STEVE TANDARIC,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT.

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To the Honorable, The Chief Justice and The Associate Justices of the Supreme Court of the United States:

The petition of Steve Tandaric respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURTS BELOW.

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was entered on October 8, 1957. It is not reported, but it appears in the record filed with and certified by the Clerk of the Court of Appeals and transmitted herewith. The record was not printed for use of the Court of Appeals, but was considered on typewritten stenographic transcript and certified record of the trial court.

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming said judgment was filed August 12, 1958 and is reported in 257 F.2d 895. The opinion is also set forth in the appendix hereto and in the certified copy of the record.

A motion for rehearing was entered and was denied on September 3, 1958.

On September 22, 1958 the United States Court of Appeals ordered that the mandate heretofore issued by that court to the United States District Court for the Northern District of Illinois, Eastern Division be recalled, and that the reissuance of said mandate be stayed for a period of thirty days from this date, subject to the provisions of rule 28.

On October 21, 1958 the court ordered that the reissuance of the mandate in this appeal be further stayed for an additional fifteen days.

On November 3, 1958 the court ordered that the motion of counsel for a further stay of the reissuance of the mandate be denied.

On November 10, 1958, motion having been filed on November 5, 1958, the court ordered that the motion of counsel for plaintiff-appellant to further stay the reissuance of the mandate of the United States Court of Appeals for an additional fifteen days from November 6, 1958 be granted.

JURISDICTION.

This petition is filed within the time allowed by the United States Court of Appeals and within ninety days of the denial of the petition for rehearing in the United States Court of Appeals for the Seventh Circuit.

The jurisdiction of this Court is invoked under 28 U S C Section 1254 (1) 62 Stat. 928.

QUESTIONS PRESENTED FOR REVIEW.

I.

Did the law in force and effect on February 9 1939, when the petitioner reentered the United States, after lawful residence in the United States, require that the petitioner have a valid immigration visa or a reentry permit; and was he not exempted therefrom under the Act then in force and the regulations made thereunder?

II.

Was the giving of false statements by the petitioner prior to entry pertinent or material to his right to reenter the United States when he held an unrelinquished domicile of more than seven consecutive years in the United States and was returning to his domicile after a temporary absence?

III.

Was the petitioner, who had an unrelinquished domicile in the United States at the time of his reentry, subject to deportation in view of Section 10(a) of the Immigration Act of 1924 which made application for reentry permit permissive rather than mandatory, and in view of section 10(f) thereof which reads: "Nothing in this section shall make such permit the exclusive means of establishing that the alien is so returning?"

IV.

Was the petitioner subject to deportation in view of Section 13(b) which reads: "In such classes of cases and under such conditions as may be by regulation prescribed,

immigrants who have been legally admitted to the United States and who depart therefrom temporarily may be admitted to the United States without being required to obtain an immigration visa"?

V.

Was petitioner accorded due process and fair trial in the proceedings before the Immigration Service, the Commissioner of Immigration or the Board of Immigration Appeals?

STATUTES AND REGULATIONS INVOLVED.

Immigration Act of 1917
39 Stat. 874, 8 U.S.C. 136

Section 3. (7) Provided further that aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Attorney General, and under such conditions as he may prescribe;

8 CFR Sec. 13.1. Aliens returning to unrelinquished domicile; domicile defined. Aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the secretary of labor and under such conditions as he may prescribe. In such case satisfactory proof of domicile in the United State for seven consecutive years, and of departure therefrom with the intention of returning thereto, will be exacted. Every case of exclusion for any cause in which the alien has given such proof, shall be promptly brought by the official in charge to the attention of the Secretary of Labor, through the usual official channels, with a complete report of the reasons for the alien's exclusion and of the proof which has been offered of continuous and unrelinquished domicile, together

with a statement of the duration of the absence. Domicile, for the purpose of this section means that place where a person has his true, fixed and permanent home, and principal establishment, to which, whenever he is absent, he has the intention of returning.

Immigration Act of 1924
43 Stat. 153: 8 U.S.C. 201

Non Quota Immigrant Defined.

Section 4. When used in this Act the term "non quota immigrant" means —

(b) An immigrant previously lawfully admitted to the United States, who is returning from a temporary visit abroad.

Sec. 10 (a) Any alien about to depart temporarily from the United States may make application to the Commissioner of Immigration and Naturalization for a permit to reenter the United States, stating the length of his intended absence, and the reasons therefor. Such application shall be made under oath, and shall be in such form and contain such information as may be by regulations prescribed, and shall be accompanied by two copies of the applicant's photograph.

(b) If the Commissioner of Immigration and Naturalization finds that the alien has been legally admitted to the United States, and that the application is made in good faith, he shall, with the approval of the Attorney General, issue the permit, specifying therein the length of time, not exceeding one year, during which it shall be valid. The permit shall be in such form as shall be by regulations prescribed and shall have permanently attached thereto the photograph of the alien to whom issued, together with

such other matter as may be deemed necessary for the complete identification of the alien.

(c) On good cause shown the validity of the permit may be extended for such period or periods, not exceeding six months each, and under such conditions, as shall be by regulations prescribed.

(f) A permit issued under this section shall have no effect under the immigration laws, except to show that the alien to whom it is issued is returning from a temporary visit abroad; but nothing in this section shall be construed as making such permit the exclusive means of establishing that the alien is so returning. (43 Stat. 158-159; 8 U.S.C. 210 (a) - 210 (f).)

Section 13 (a) No immigrant shall be admitted to the United States unless he (1) has an unexpired immigration visa or was born subsequent to the issuance of the immigration visa of the accompanying parent; (2) is of the nationality specified in the visa in the immigration visa; (3) is a nonquota immigrant if specified in the visa in the immigration visa as such; (4) is a preference-quota immigrant if specified in the visa in the immigration visa as such; and (5) is otherwise admissible under the immigration laws:

Section 13 (b) In such classes of cases and under such conditions as may be by regulations prescribed immigrants who have been legally admitted to the United States and who depart therefrom temporarily may be admitted to the United States without being required to obtain an immigration visa.

ADDITIONAL REGULATIONS FROM CODE OF FEDERAL REGULATIONS.

* * * Whenever a recorded statement is to be obtained from a person under investigation he shall be warned that any statement made by him may be used as evidence in any subsequent proceedings.

8 CFR 150.1(c) 1947 Supp.

There shall be in the office of the Attorney General a Board of Immigration Appeals. It shall be under the supervision and direction of the Attorney General and shall be responsible solely to him. The Board of Immigration Appeals shall consist of a chairman and four other members. * * *

8 CFR 90.2 1947 Supp.

Appeals shall lie to the Board of Immigration Appeals in matters involving deportation cases.

8 CFR 90.3(a) 1947 Supp.

In considering and determining such appeals, the Board of Immigration Appeals shall exercise such discretion and power conferred upon the Attorney General as is appropriate and necessary for the disposition of the case. The decision of the Board shall be in writing and shall be final except in those cases reviewed by the Attorney General. * * *

8 CFR 90.3(c) 1947 Supp.

Except as may be modified or overruled by the Board of Immigration Appeals or the Attorney General, decisions of the Board of Immigration Appeals shall be binding on all officers and employees of the Immigration and Naturalization Service. * * *

8 CFR 90.3(d).

* * * The decision of the Board shall be in writing and shall be final except in those cases reviewed by the Attorney General. * * *.

8 CFR 90.3(c) 1947 Supp.

Reconsideration or reopening of any case in which an order has been entered by the Board of Immigration Appeals * * * whether requested by the Commissioner or by the party against whom the order is effective * * * shall be only by written motion. * * * A motion to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material. A motion to reconsider shall state the reasons for reconsideration and shall be supported by such precedent decisions as are pertinent.

8 CFR 90.11(b) 1947 Supp.

* * * If the Commissioner is the moving party, he shall serve a copy of his motion upon the counsel or representative of the party against whom the order is effective * * * and shall make proof thereof. The party shall be given a reasonable time * * * within which to be heard, if oral argument is granted, or to file such briefs or memoranda as he deems appropriate.

8 CFR 90.12 1947 Supp.

ADMINISTRATIVE PROCEDURE ACT

Order means the whole or any part of the final disposition (whether affirmative, negative, injunctive or declaratory in form) of any agency in any matter other than rule making. * * *

60 Stat. 243; 5 USCA 1002(d).

STATEMENT OF THE CASE.

Complaint was brought by petitioner for judicial review under the Administrative Procedure Act and for declaratory judgment and injunctive relief.

Petitioner, Steve Tandaric, was born December 12, 1907 in Kovocica, Slovinska, which was a part of Austria-Hungary at the time of his birth, and is now a part of Jugoslavia. (R. 175) He entered the United States lawfully on July 2, 1911, when about four years old and was accepted as a permanent resident. (R. 180) He has lived in the United States, most of the time in the State of Indiana, continuously since then except for a period of approximately two years, from March, 1937 to February 9, 1939, which he spent in Spain as a member of the Abraham Lincoln Brigade, to fight on the side of the loyalists against the forces of Franco. His mother, two sisters and a brother are all residents and citizens of the United States. (R. 178) His father is deceased.

On October 3, 1944 a warrant of arrest was issued against petitioner charging that he had been found in the United States in violation of the Immigration Act of May 26, 1924, in that at the time of entry (February 9, 1939) he was an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by said Act or regulations made thereunder; and in violation of the Act of February 5, 1917 in that he admits having committed a felony or other crime or misdemeanor involving moral turpitude prior to entry into the United States, to wit perjury. (R. 202)

(It is appropriate parenthetically to call attention to the law in force at the time that petitioner was a "non

quota immigrant". Immigration Act of 1924 (43 Stat. 153 8 U.S.C. 201) Section 4 (b)).

A hearing with respect to the two charges specified in the warrant of arrest was held on July 24, 1946; on September 23, 1946 the presiding inspector who had conducted the hearing sustained the charges in the warrant of arrest and held the petitioner was not entitled to any discretionary relief and recommended deportation. (R. 166-171)

On March 7, 1947 the case was ordered reopened by the Commissioner of the Immigration Service on the ground that at the hearing held on July 24, 1946, the presiding inspector had not sufficiently and accurately defined perjury to plaintiff. (R. 160-163) In compliance with said order of the Commissioner subsequent hearings were held on April 10, 1947 and May 26, 1947. (R. 146-152) On June 18, 1947 the presiding inspector submitted a memorandum in which his proposed order was that plaintiff be deported on the charges stated in the warrant of arrest. (R. 147) Exceptions were filed and on October 24, 1947 the Acting Commissioner of the Immigration Service recommended that plaintiff be deported on the charges contained in the warrant of arrest. (R. 140-145)

On Appeal to the Board of Immigration Appeals on December 26, 1947, the Acting Chairman of said Board ordered that the Acting Commissioner's order and warrant of deportation be withdrawn and further ordered that the hearing be reopened to determine plaintiff's possible affiliation with or membership in an organization proscribed by the Act of October 16, 1918, as amended. (R. 138-139)

July 12, 1950 petitioner was notified by the Immigration Service to appear on August 10, 1950 for a hearing dealing with the charges contained in the original warrant

of arrest, namely illegal entry and admission of perjury. (R. 137) When petitioner presented himself for hearing, he was informed by the hearing examiner that the hearing would deal with the question of petitioner's possible affiliation with or membership in an organization proscribed by the Act of October 16, 1918. (R. 63) The hearing, therefore, did not conform to the notice which called for a hearing dealing with illegal entry and admission of perjury. (Except for one or two questions the testimony presented at the hearing, August 10-11, 1950, did not deal with the subject matter set forth in the notice of July 12, 1950. (R. 63-136)).

October 12, 1950, the hearing examiner held that the hearings of August 10-11, 1950 had failed to develop any evidence which could establish plaintiff's affiliation with or membership in a proscribed organization. (R. 62) He concluded his recommended decision as follows: "The hearing examiner concurs with the opinion of the presiding inspector of September 23, 1946".

Exceptions to the recommended decision were duly filed.

November 24, 1950, the assistant Commissioner of the Immigration Service ordered that the alien be deported on the charges contained in the warrant of arrest and denied suspension of deportation. (R. 40-47)

Timely appeal was filed to the Board of Immigration Appeals. April 6, 1951, the Board of Immigration Appeals dismissed petitioner's appeal. (R. 28-31)

February 1, 1956 petitioner was ordered to appear at the Chicago office of the Immigration Service for deportation on February 6, 1956. Plaintiff applied for a stay of deportation on the ground that he would be subjected to physical persecution if deported to Jugoslavia. Stay was

denied and on March 20, 1957 petitioner was arrested at his place of employment and placed in custody pursuant to the order of deportation issued November 24, 1950.

March 22, 1957, petitioner filed his complaint in the United States District Court for the Northern District of Illinois, Eastern Division, seeking judicial review of the order of deportation and for declaratory and injunctive relief. (R. 4-12)

October 8, 1957, findings of fact, conclusions of law and judgment were entered affirming the order of deportation.

Notice of appeal to the U. S. Court of Appeals for the Seventh Circuit was filed January 14, 1958, the case argued, and on August 12, 1958 the United States Court of Appeals for the Seventh Circuit affirmed the judgment of the trial court.

REASONS FOR ALLOWANCE OF WRIT

I.

The subject matter of this petition deals primarily with an alien lawfully admitted and domiciled in the United States who returns to the country after a temporary absence. He is not, and it is not fair to regard him, as a new immigrant seeking entry into the country. His rights are established by the fact of his unrelinquished domicile.

Petitioner was permanently domiciled in the United States for twenty-six years. It was not necessary for him to obtain permission to leave the country temporarily. It was not necessary for him to apply for a permit to reenter.

He was a "non-quota immigrant" at the time he returned to the United States. Section 4(b) Immigration Act of 1917.

He was not required to obtain a visa upon his reentry. (Sec. 13 (b) Immigration Act of 1917).

Section 10(a) provides that an alien about to depart *may* make application for a permit to re-enter. The provision is permissive — not mandatory. If he makes such application the section provides conditions to be complied with.

Section 10(f) provides: "A permit issued under this section shall have no effect under the immigration laws, except to show that the alien to whom it is issued is returning from a temporary visit abroad; but nothing in this section shall be construed as making such permit the exclusive means of establishing that the alien is so returning". (43 Stat. 158-159; 8 U.S.C. 210 (a); 210 (f).)

Obviously, such a permit is merely a form of identification, and it is not the exclusive means of determining that the alien is so returning. Any other means of establishing the facts would meet the intent of the provision, and where substantial rights are involved, the intent rather than the form should have legal sanction.

Had petitioner abandoned his legal domicile and then endeavored to return to the United States his position would be that of a quota immigrant, who would be subject to the rules established for entry of a new immigrant.

The petitioner was denied suspension of deportation as well as voluntary departure. The Immigration Service denied him every benefit of the law applicable at the time, and the denial was affirmed by the courts.

An examination has been made of the opinions of the Board of Immigration Appeals in similar situations in order to determine the usual policy of the Board in relation to the laws in existence at the time of petitioner's presence in the United States and at the time of his reentry. It is interesting to observe that the attitude of the Board appears to mark petitioner's case as the exception.

(*Note:* Citations noted hereafter in this petition are the decisions of the Board of Immigration Appeals taken from Vol. 1, Administrative Decisions Under Immigration and Nationality Laws of the United States, August 1940 through December, 1943, Government Printing Office, Washington, D.C. 1947.

These decisions will be cited by name, number, date and page of Volume I as follows: In the Matter of L.....No. 56819/808 decided August 29, 1940, Page #1.)

The Board of Immigration Appeals held in The Matter of G, case #54107/694 decided October 13, 1942, page 321, the alien having had no reentry permit or immigration visa,

> "In an individual case and in accordance with a long administrative practice, and solely in regard to any alien's admissibility under the 1924 Act, this Board may admit a returning resident under Section 13(b) who is not in possession of an immigration visa not exempted from possessing a visa by general regulations."

In the Matter of G....., opinion #56101/698, decided May 9, 1942, Page 232, where the alien had neither a reentry permit nor an immigration visa, the Board held:

> "In an individual case and in accordance with a long administrative practice, and solely in regard to an alien's admissibility under the 1924 act, this Board may admit a returning resident under section 13 (b) who is not in possession of an immigration visa not exempted from possessing a visa by general regulations."

II.

Petitioner had the right to reenter the United States. He was not in an excludable class.

The alleged false statement was not material or pertinent to his right to reenter because his right to reenter obviously existed on valid legal grounds other than citizenship.

He required neither a visa nor reentry permit to enter in 1939 and even if he had not followed the formal regulations relative to reentry, the provisions of the law nevertheless made his reentry legally possible. He had not lost his domicile under the decisions, and the regulations could have been complied with or waived. The government was not defrauded by the false statement.

Furthermore, the petitioner did not make a voluntary admission of perjury, and it is the voluntariness of the admission which is a prerequisite to a basis for deportation, provided, of course, the false statement is also material to the subject matter.

In the Matter of C.....G..... No. 55924/957, decided by the Board on April 22, 1941, page 70, involved perjury concerning his relations with a person whom he represented as his wife on reentry, though he had not married her. The Board says:

> "The appellant was excluded by the board of special inquiry on the ground that he did not possess an immigration visa and also on the ground that he did not possess a passport visa. These two grounds of exclusion are mutually contradictory, since the appellant cannot be an immigrant and a non-immigrant at the same time. * * * He admits at the present hearing that on primary examination he stated under oath

that the woman was his wife. He admitted at the 1935 hearing before the board of special inquiry that he was not married to her, and that he had merely lived with her for about two years. The appellant admits that on primary examination he made other false statements, which need not be discussed because they are obviously immaterial. The appellant admits that he committed perjury by stating under oath on January 22, 1935 that he was married to D.....U..... The appellant committed perjury only if the above statement was material to his admissibility in 1935.

* * * The appellant admitted at the 1935 hearing that he intended to resume his former relationship if admitted. * * * Accordingly, the appellant's false statement to the effect that he was married was not material to his admissibility. Consequently he is not excludable on the ground that he admits the commission of perjury."

To the same effect is In The Matter of B..... #56071/391, decided June 25, 1941, Page 121: The false statements of an alien before a Board of Special Inquiry that she has not seen her husband for sometime and did not know his whereabouts are not material to the right of the alien to enter the United States. "Whether they knew or did not know the whereabouts of her husband/father has no bearing on their admissibility as idiots, imbeciles or as members of any of the classes excluded by Section 3."

An admission of crime must be voluntary to render an alien excludable under Section 3 of the Immigration Act of 1917. The Board decided in the Matter of G.....PX5327, April 30, 1942, page 225:

"We are unable to accept the position of the board of special inquiry in preexamination proceedings that the applicant would be inadmissible to the United States as one who has admitted the commission of the offense

described. We feel that the board of special inquiry committed error. Section 3, *supra*, is clear that in order to subject the applicant to exclusion on the ground of the admission of an offense, the admission must come voluntarily from her. It is not sufficient that the testimony show an offense has been committed. It must be an explicit admission thereof by the applicant. Moreover, the admission should be wholly voluntary. The testimony as a whole in this case creates some question as to whether the necessary elements to constitute perjury are present. In any event there seems to be no doubt that the voluntary aspect of an admission is lacking. The persistence on the part of the board of special inquiry to extract an admission from the applicant, even after she indicated she could not, in view of the attending circumstances, make an admission, smacks of an attempt on their part to try the guilt of the applicant. The statute does not license this manner of interrogation, otherwise the very purpose and requirement of the statute would be defeated. In a word, such a process is circumscribed and whether the applicant is telling the truth or not is not for the immigration authorities to judge. By so doing they exceed their jurisdiction. (*U.S. ex rel. Castro* v. *Williams*, 203 F. 155; *Howes* v. *Tozer*, 3 F.2d 849; 39 Op. Atty. Gen. 58; *U.S. ex rel. Rosen* v. *Williams*, 200 F. 538.) We are of the opinion, therefore, that the interrogatories put to the applicant after she indicated a refusal to admit the commission of the offense were not competent. We do not hold that in a proceeding of this nature proper and even prolonged interrogation may not be undertaken and often found necessary. Where, however, there has been a refusal to make an admission it is not competent to extract an admission that is not voluntary on the part of the alien. Therefore, any admission she may have made at that time must be considered as moot. Consequently, we must find that the applicant would not be inadmissible to the United States as found by a board of special inquiry."

In the instant case two separate hearings were held to explain the charge of perjury and to obtain an admission from the petitioner herein, the circumstances being such as to leave no room for doubt that the admission, if one were made, and if the matter were material; was anything but voluntary. See record, pages 150-152.

We refer now to the Matter of B....., V292720, decided March 27, 1942, page 204. In this decision the Board disagrees completely with its decision in the instant case. In the Matter of B.....: the Board held if upon an alien's reapplication for admission on the seventh proviso to section 3 of the Immigration Act of 1917 should be exercised in his favor, in regard to a ground of inadmissibility, such as a conviction or admission of a crime involving moral turpitude, he may in a deportation proceeding be granted voluntary departure notwithstanding the provisions of Section 19 (d) of the Immigration Act of 1917 as amended.

In the instant case the petitioner sought and was denied voluntary departure.

III.

When a person has an unrelinquished right of domicile in the United States, even though he may be ordered deported and is actually deported, such deportation does not of itself terminate his right of domicile. Hence, he cannot, under those circumstances be precluded from consideration under the seventh proviso of Section 3 aforesaid.

The Board of Immigration Appeals and the Court erred in the instant case in refusing to consider the rights of the petitioner under Section 3 (7), in refusing to consider his rights as a non-quota immigrant under Section 13 (a)

and his right not to have an immigration visa under Section 13(b).

The Board of Immigration Appeals in The Matter of L.....56019/818 decided August 29, 1940, page 1, ruled as follows:

> 1. When an alien is deportable under section 19 of the Immigration Act of 1917 because of conviction of a crime involving moral turpitude prior to entry, and a record exists of his last entry, discretion may be exercised to admit him *nunc pro tunc* under the 7th proviso to Section 3 of the Immigration Act of 1917. Section 3 and section 19 of the Act must be read together.
>
> 2. When an alien has lived here for a long time, has been law abiding, except for conviction for larceny of a watch committed in 1924 when intoxicated, and bears a good reputation, discretion under the 7th proviso to Section 3 of the Immigration Act of 1917 will be exercised.

It appears from the foregoing that a denial to the petitioner of discretionary relief was arbitrary and capricious.

In the Matter of S.....55915/701 decided December 6, 1943, page 646, the alien had had seven years residence in the United States and left the country voluntarily pursuant to an order of deportation based on a conviction for perjury. The Board held that after seven years of actual residence in the United States, followed by a departure under a warrant of deportation, such deportation in and of itself does not operate to terminate his domicile in the United States, and preclude him from consideration under the 7th proviso to section 3 of the Immigration Act of 1917, as amended.

It seems clear that even if deportation does not terminate domicile certainly the temporary leaving of the peti-

tioner and his return to his former domicile has not terminated his domiciliary rights and therefore he had a right to be readmitted without presenting a visa or reentry permit under the law then in force.

To deny him that right and to order deportation after twenty six years of continuous residence in the same domicile is unjustified.

IV.

The petitioner had no immigration visa upon his return to the United States. As a non quota immigrant he did not require a passport.

Obviously it was the intent of the law that a person domiciled in the United States for a long period would have the right to return after departure, without a visa — he was no longer in the category of a quota immigrant who was required to submit to and be covered by certain regulations.

A reentry permit has no effect under the law except to show that the alien is returning from a temporary visit, and it is not even the exclusive means of establishing that the alien is so returning (Sec. 10 (f)).

It seems extraordinary to order so drastic a proceeding as deportation against a resident of twenty-six years for failure to have a visa which the law says he doesn't require, and for failure to have a reentry permit which has no effect other than perhaps identification, which does not guarantee reentry, and which is also not an exclusive means of establishing the return of the alien.

V.

Deportation proceedings were commenced against petitioner on October 3, 1944, when a warrant of arrest was issued against him and served on him December 7, 1944 (R. 202). The warrant of arrest charged petitioner with illegal entry and admission of perjury.

On July 24, 1946, a hearing was held with respect to the two charges specified in the warrant of arrest (R. 172-201). The Presiding Inspector held that the charges in the warrant of arrest were sustained and also held that petitioner was not entitled to any discretionary relief and recommended he be deported (R. 166-171).

On March 7, 1947, the case was ordered reopened by the Commissioner of the Immigration Service on the ground that at the hearing held on July 24, 1946, the term perjury had not been sufficiently and accurately defined (R. 160-163). The Commissioner cited cases giving the necessary elements of perjury (R. 162). In compliance with said order, a hearing was held on May 26, 1947, at which time perjury was redefined but the record does not reveal an unequivocal admission by petitioner (R. 150-152). At this hearing, the Presiding Inspector, himself, introduced and accepted in evidence a statement dated August 16, 1944, allegedly made by petitioner to a representative of the Immigration Service (R. 155-159). Said representative was not present for cross-examination and no explanation was given to explain his absence. The document accepted in evidence did not conform to the following agency regulation:

> ". . . Whenever a recorded statement is to be obtained from a person under investigation, he shall be warned that any statement made by him may be used as evidence in any subsequent proceedings." 8 CFR 150.1(c), 1947 Supp.

In spite of the fact that perjury was also erroneously defined in said document (R. 158), and that the document should not have been accepted in evidence, the record reveals that on more than one occasion heavy reliance was placed on the contents of the document (R. 143, 147).

After the hearing of May 26, 1947, the Presiding Inspector submitted a one-page Memorandum; dated June 18, 1947, in which he recommended that petitioner be deported on the charges stated in the warrant of arrest. Said Memorandum does not contain findings of fact and conclusions of law as spelled out by the regulations of the Immigration Service. (8 CFR 150.7(a), (c); 1947 Supp.)

On October 24, 1947, the Acting Commissioner affirmed the recommendation of the Presiding Inspector. At this point, petitioner's appeal was filed with the Board of Immigration Appeals. Said Board on December 26, 1947, ordered the withdrawal of both the order and warrant of deportation (R. 138). The Board said the following with regard to perjury:

> ". . . We have serious doubts, on the basis of the record before us, that respondent is subject to deportation on the criminal charge contained in the warrant of arrest. . . ." (R. 138).

After a lapse of nearly three years, petitioner was notified on July 12, 1950, by the Immigration Service, to appear on August 10, 1950, *for a hearing dealing with the charges specified in the original warrant of arrest issued in 1944, namely, illegal entry and admission of perjury* (R. 137). When petitioner presented himself for said hearing, he was informed that the hearing would deal with the question of petitioner's possible affiliation with or membership in an organization proscribed by the Act of October 16, 1918 (R. 63). It is clear that improper

notice was given petitioner since the notice did not correctly indicate the subject matter of the hearing. ("Persons entitled to notice of an agency hearing, shall be timely informed of the time, place and nature thereof." 60 Stat. 239.)

On October 12, 1950, the Hearing Examiner held that the hearings of August 10-11, 1950, had ". . . failed to develop any evidence . . . which would establish plaintiff's affiliation with or membership in a proscribed organization." Further, the Hearing Examiner held ". . . that this case does not warant a further discussion of the evidence, proposed findings of fact and conclusions of law as to deportability . . ." and concluded his findings as follows: "The Hearing Examiner concurs with the Opinion of the Presiding Inspector of September 23, 1946."

Thus, aside from the fact that failure to formulate findings of fact and conclusions of law was contrary to agency regulations (8 CFR, 150.7(a), 1947 Supp.), the Hearing Examiner in effect reached back into the record and on the basis of the hearings held on July 24, 1946 and May 26, 1947, in which hearings he had not participated, and without hearing any evidence whatever concluded that both charges against petitioner were sustained and that petitioner should be deported. The Hearing Examiner disregarded completely the fact that he had been limited by the order of the Board of Immigration Appeals to confine the hearings, and by clear implication his findings, only to the consideration of whether petitioner had belonged to a proscribed organization (R. 138). Since the Hearing Examiner had determined that there was no evidence on which to lodge a new charge against petitioner, and since no evidence whatever had been developed in said hearings on the original two charges,

his recommendation to deport was based on no evidence whatever, and was contrary to the law that an order of deportation shall be based on reasonable, substantial and probative evidence. Therefore the recommendation and the order issued therein were arbitrary and in violation of due process.

On November 24, 1950, the Assistant Commissioner of the Immigration and Naturalization Service ordered the deportation of plaintiff to Yugoslavia. On April 6, 1951, the Board of Immigration Appeals affirmed said order of deportation. Said order as heretofore pointed out was not based on any evidence and therefore petitioner was denied due process.

Between the time the order of 1947 was rendered and the year 1951, when the Board affirmed the second deportation order issued against petitioner, not one page of testimony was developed or any new evidence offered with respect to the two charges lodged against petitioner in 1944.

It is respectfully submitted that the order of deportation issued on November 24, 1950, is not supported by reasonable, substantial and probative evidence but is arbitrary and capricious and, as such, violates plaintiff's right to due process under the Fifth Amendment to the Constitution of the United States.

The order of the Board of Immigration Appeals rendered on December 26, 1947, by which order said Board withdrew the order and warrant of deportation then pending against petitioner must be considered as a final order under 8 CFR 90.3(c), 1947 Supp., and all orders entered subsequent thereto are invalid and of no force or effect.

The rules and regulations established by the Attorney General for the administration of the immigration laws

specifically spelled out the function and powers of the Board of Immigration Appeals as follows:

(1) "There shall be in the Office of the Attorney General a Board of Immigration Appeals. It shall be under the supervision and direction of the Attorney General and shall be responsible solely to him. The Board of Immigration Appeals shall consist of a chairman and four other members. . . ." 8 CFR 90.2, 1947 Supp.

(2) This section provides that appeals shall lie to the Board of Immigration Appeals in matters involving deportation cases. 8 CFR 90.3(a), 1947 Supp.

(3) "In considering and determining such appeals, the Board of Immigration Appeals shall exercise such discretion and power conferred upon the Attorney General as is appropriate and necessary for the disposition of the case. *The decision of the Board shall be in writing and shall be final except in those cases reviewed* by the Attorney General. . . ." 8 CFR 90.3(c), 1947 Supp.

(4) "Except as may be modified or overruled by the Board of Immigration Appeals or the Attorney General, decisions of the Board of Immigration Appeals shall be binding on all officers and employees of the Immigration and Naturalization Service. . . ." 8 CFR 90.3(d).

The Board of Immigration Appeals was established as an appellate tribunal and not as an investigative or administrative body, and, as such, was limited by the nature of an appellate body to consider the case on the basis of the record presented for review. The Board was placed under the supervision of the Attorney General and responsible only to him. The Board could not be considered as a structural part of the administrative

apparatus. The Immigration and Naturalization Service was an entity separate and apart from the Board and with functions wholly unrelated to those of the Board.

The Administrative Procedure Act defines the meaning of "order" as follows:

> " 'Order' means the whole or any part of the final disposition (whether affirmative, negative, injunctive or declaratory in form) of any agency in any matter other than rule making. . . ." 60 Stat. 243; 5 USCA 1002(d).

The rules and regulations established by the Attorney General with respect to the Board of Immigration Appeals set out the intent of the above quoted section from the Administrative Procedure Act in the following words:

> ". . . The decision of the Board shall be in writing and shall be final except in those cases reviewed by the Attorney General. . . ." 8 CFR 90.2(6), 1947 Supp.

The order of the Board was in writing, was not reviewed by the Attorney General, and was specific in language:

> "Order: The Acting Commissioner's order and warrant of deportation are withdrawn. . . ." (R. 139).

The regulation in effect at the time the Board acted provided that an order of the Board could be reconsidered or reopened but only under the following circumstances:

> "Reconsideration or reopening of any case in which an order has been entered by the Board of Immigration Appeals . . . whether requested by the Commissioner or by the party against whom the order is effective . . shall be only by written motion. . . A motion to reopen shall state the new facts to be

proved at the reopened hearing and shall be supported by affidavits or other evidentiary material. A motion to reconsider shall state the reasons for reconsideration and shall be supported by such precedent decisions as are pertinent." 8 CFR 90.11(b), 1947 Supp.

". . . If the Commissioner is the moving party, he shall serve a copy of his motion upon the counsel or representative of the party against whom the order is effective . . . and shall make proof thereof. The party shall be given a reasonable time . . . within which to be heard, if oral argument is granted, or to file such briefs or memoranda as he deems appropriate." 8 CFR 90.12, 1947 Supp.

The Commissioner did not ask for reconsideration or reopening of the case before the Board.

The fact that the Board withdrew both the order and warrant of deportation then outstanding against plaintiff justifies the conclusion that the Board did not consider the evidence sufficient to sustain the charges of illegal entry and admission of perjury. It must be emphasized that had the Board considered the evidence as being sufficient to sustain *either* illegal entry or admission of perjury it could have affirmed the Commissioner's order of deportation. This the Board did not do.

CONCLUSION.

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted.

PEARL M. HART,
Attorney for Petitioner.

APPENDIX.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

STEVE TANDARIC, Plaintiff, v. ROBERT H. ROBINSON, District Director of Immigration, Chicago District, Immigration & Naturalization Service, Defendant.	No. 57 C 520

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action having been commenced by the filing of the complaint for judicial review on March 22, 1957; an answer thereto having been filed on March 28, 1957, and the matter coming on for hearing on May 6, 1957, after several continuances requested by plaintiff, and the court having heard arguments of counsel for both sides and having considered the pleadings and briefs herein, and due consideration having been had thereon, the following Findings of Fact and Conclusions of Law are hereby made:

FINDINGS OF FACT

(1) That the plaintiff, Steve Tandaric, is an alien and citizen of Austria-Hungary, now part of Yugoslavia, residing within East Chicago, Indiana, in the jurisdiction of this court;

(2) That the respondent, Robert H. Robinson, is the duly appointed, qualified and acting district director of Immigration and Naturalization for the Immigration and Naturalization Service with headquarters in Chicago, Illinois;

(3) That the plaintiff, Steve Tandaric, last entered the United States on February 9, 1939;

(4) That on October 3, 1944, Herman R. Landon, then Chief of the Exclusion and Expulsion Section, Immigration and Naturalization, Philadelphia, Pa., issued a warrant of arrest charging that the plaintiff had been found in the United States in violation of the Immigration Law of May 26, 1924, for the reason that at the time of entry he was an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by said Act or Regulations made thereunder; and the Act of February 5, 1917, in that he admits having committed a felony or other crime or misdemeanor involving moral turpitude prior to entry into the United States, to wit: perjury;

(5) That pursuant to the warrant of arrest, a hearing was afforded plaintiff before a presiding inspector on July 24, 1946. The presiding inspector thereafter, on September 23, 1946, sustained the charges in the warrant of arrest and furthermore held that the plaintiff was not entitled to any discretionary relief and recommended the respondent's deportation. However, on March 7, 1947, the case was ordered reopened by the Commissioner, it having been concluded that the crime of perjury had not been properly defined to plaintiff.

(6) That subsequent hearings were thereafter held on April 10, 1947 and May 26, 1947;

(7) That on October 24, 1947, an order was entered by the Acting Commissioner, Immigration and Naturalization Service, directing plaintiff's deportation to Yugoslavia on the charges contained in the warrant of arrest.

(8) After appeal to the Board of Immigration Appeals, on December 26, 1947, the Acting Chairman of the Board of Immigration Appeals, United States Department of Justice, ordered that the hearing be reopened;

(9) Further hearings were thereafter held on August 10th and 11th, 1950;

(10) That on November 24, 1950, A. C. Debaney, Assistant Commissioner, Adjudications Division, Immigration and Naturalization Service, ordered that the alien be deported from the United States on the charges stated in the warrant of arrest;

(11) Subsequent to this order an appeal was made to the Board of Immigration Appeals, and on April 6, 1951, said appeal was dismissed by Thomas S. Finucane, Chairman, Board of Immigration Appeals, United States Department of Justice;

(12) That on January 14, 1950, plaintiff was paroled under deportation proceedings under a $500.00 appearance bond; that on January 12, 1955, parole was withdrawn, and the plaintiff was placed under an order of supervision at Hammond, Indiana;

(13) That on February 1st, 1956, defendant was ordered to appear at the Chicago Office of the Immigration and Naturalization Service for deportation on February 6, 1956. Subsequently, namely on February 3, 1956, plaintiff applied for a stay of deportation under Section 243(h);

(14) That pursuant to said application, the plaintiff was accorded a hearing on March 29, 1956, and subsequent thereto, namely on February 4, 1957, the Regional Commissioner, Immigration and Naturalization Service, St. Paul, Minn., denied a stay of deportation.

CONCLUSIONS OF LAW

Upon the foregoing Findings of Fact, it is concluded:

(1) That the warrant of arrest issued on October 3, 1944, is valid in all respects;

(2) That the hearings accorded the plaintiff were fair, adequate and conformed to due process of law;

(3) That the order of deportation is supported by reasonable, substantial and probative evidence;

(4) That there is nothing in the administrative processes in plaintiff's case which violated any of his rights under the Constitution of the United States or deprived him of due process of law;

(5) That there has been no application of an erroneous rule of law by the Immigration and Naturalization Service or the Board of Immigration Appeals in any of the deportation proceedings against the plaintiff;

(6) That the complaint for judicial review under the Administrative Procedure Act and for Declaratory and Injunctive Relief herein, be dismissed.

Enter:

/s/ Michael L. Igoe
Judge

Dated at Chicago, Illinois,
this 8th day of October, 1957.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 12238 SEPTEMBER TERM, 1957 APRIL SESSION, 1958

STEVE TANDARIC,
Plaintiff-Appellant,
v.
ROBERT H. ROBINSON, district director, Chicago district, Immigration and Naturalization Service, United States Department of Justice,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

August 12, 1958

Before DUFFY, *Chief Judge*, FINNEGAN and SCHNACKENBERG, *Circuit Judges*.

SCHNACKENBERG, *Circuit Judge*. Plaintiff has appealed from a judgment of the district court sustaining an order for his deportation and dismissing his complaint in an action filed by him seeking judicial review of an order of deportation issued by the Immigration and Naturalization Service (hereinafter sometimes referred to as the Service). Plaintiff, who was born at Kovocica, Slovinska, then a part of the Austro-Hungarian Empire, but now a part of Yugoslavia, was admitted to the United States for permanent residence on July 2, 1911 under the name of "Stejo Rebic". He never became a naturalized citizen of the United States.

On March 9, 1937, he applied for a passport in the name of Emil Tandaric, his deceased brother. He recited

in his application that he was a citizen of the United States, having been born at Chicago, Illinois, on May 24, 1912; that applicant had submitted a baptismal certificate in support thereof; and that the applicant had made sworn affidavit to the truth of the statements contained on the application before an agent of the Service.

Plaintiff testified at a hearing before a presiding inspector of the Service that he had signed Emil Tandaric's name to the application, that the photograph affixed thereto was a picture of plaintiff and that he had submitted Emil's baptismal certificate with the application.

In 1937, with a permit issued by the United States, plaintiff departed therefrom and enlisted in Abraham Lincoln Battalion International Brigade in Spain, serving that organization for about 23 months.

On January 7, 1939, plaintiff filed an application for registration in the name of Emil Tandaric, at the United States Consulate, Barcelona, Spain. This document recites that the applicant was born on May 24, 1912, at Chicago, Illinois, that applicant's passport had been left at "International Brigade Headquarters, Albacete, April, 1937. Babtismal (sic) certif Church of the Assumption, 6005 South Marshfield Ave., Chicago", and that applicant had made a sworn affidavit to the truth of the recitations before the American vice-consul. He testified before said presiding inspector that he had obtained a travel document at the United States consulate in Barcelona, that he had made application therefor in Emil's name, and that the signature and photograph on the application were his. On February 9, 1939, plaintiff, still using the name of Emil Tandaric, was admitted to the United States as a United States citizen.

On December 7, 1944 a warrant for the arrest of Steve Tandaric was served upon him at Hammond, Indiana. The warrant recited that Tandaric was deportable on the grounds that he entered as an immigrant not in possession of a valid immigration visa and not

exempted from the presentation thereof, and that he admitted having committed a felony or other crime or misdemeanor involving moral turpitude, prior to entry into the United States, to-wit, perjury.

On July 24, 1946, a hearing on the two charges stated in the warrant was held at the United States Penitentiary at Terre Haute, Indiana. At that time plaintiff was represented by an attorney. Tandaric was the only witness to testify at the hearing, and his testimony related to his departure from the United States in 1937 and to the circumstances surrounding his re-entry in 1939.

On September 23, 1946, the presiding inspector filed his proposed findings of fact and conclusions of law in which he recommended that the alien was deportable on both of the grounds stated in the warrant and that he was not eligible for discretionary relief in any form.

On October 1, 1946 plaintiff filed an application for voluntary departure in lieu of deportation and pre-examination. On October 14, 1946 plaintiff's attorney filed his exceptions to the proposed findings, conclusions and order.

On March 7, 1947 the Commissioner of the Service ordered the cause re-opened "for the purpose of having the term [perjury] accurately and sufficiently defined to the" plaintiff.

On April 10, 1947 a hearing was convened pursuant to this order and adjourned on motion of the alien until May 26, 1947 to enable him to secure counsel.

At the hearing on the latter date the then presiding inspector defined perjury to the plaintiff as follows:

> "You are informed that perjury is the wilful and corrupt assertion of a falsehood material to the issue in the case made under oath or affirmation in the manner prescribed by the law before a person authorized to administer oaths. Do you understand?"

The presiding inspector then asked the plaintiff:

> "Do you admit at this time that you committed perjury before the American Consul at Barcelona, on January 7, 1939, when you made application for registry form?"

The plaintiff answered:

> "I recognize that it amounts to perjury, but at the time action was taken, I did not think in the terms of perjury. I didn't recognize at the time that it was perjury."

The plaintiff further testified that the same answer applied to his 1937 passport application.

On June 18, 1947 the presiding inspector filed a memorandum in which he recommended that the alien be deported to Yugoslavia on the charges stated in the warrant of arrest. On July 3, 1947 plaintiff's attorneys filed exceptions to the memorandum and proposed order.

On October 24, 1947 the Acting Assistant Commissioner filed a memorandum in which he held that the charges had been sustained and that the plaintiff was ineligible for discretionary relief. It was accordingly recommended that his applications for voluntary departure, pre-examination and suspension of deportation be denied and that the plaintiff be deported to Yugoslavia. On December 26, 1947 the Board of Immigration Appeals (hereinafter sometimes referred to as the Board) entered an order which recited that

> "* * * upon reviewing the record, we note that a question has been raised as to respondent's possible affiliation with or membership in an organization proscribed by the Act of October 16, 1918, as amended. We think that before passing upon the merits of this case, the hearing should be reopened so that further evidence may be taken on this issue. If the further evidence developed at the hearing warrants, an appropriate charge should be lodged based upon the Act of October 16, 1918, as amended.

In the meantime, the Commissioner's order and warrant of deportation will be withdrawn.

"Order: The Acting Commissioner's order and warrant of deportation are withdrawn, and

"It Is Ordered that the hearing be reopened to adduce additional evidence in accordance with the foregoing opinion and to lodge such further charges as the immigration authorities deem appropriate."

On August 10, 1950, pursuant to notice, a further hearing was held on the sole question of whether plaintiff was affiliated with or a member of an organization proscribed by Act of October 16, 1918, as amended, in accordance with the order of the Board of Immigration Appeals.

On October 12, 1950 the hearing examiner filed a memorandum in which he held that the hearing had "• • • failed to develop any evidence which would warrant a finding that the respondent is affiliated with or a member of an organization proscribed by the Act of October 16, 1918, as amended." The memorandum further stated that the hearing examiner concurred with the presiding inspector's opinion of September 23, 1946. On October 23, 1950, the plaintiff's attorney filed exceptions to the hearing examiner's recommended decision.

On November 24, 1950 an assistant commissioner filed a memorandum in which he held that both of the charges in the original warrant had been sustained, that plaintiff was ineligible for suspension of deportation or pre-examination, and that his application for voluntary departure should be denied. It was accordingly ordered that his applications for suspension of deportation, voluntary departure and pre-examination be denied and that the alien be deported.

After the plaintiff had filed timely notice of appeal an oral argument was conducted on February 14, 1951 before the Board. On April 6, 1951 the Board entered its decision in which it was held that the plaintiff was

deportable; that he was ineligible for the discretionary relief of suspension of deportation and that, in its discretion, his application for voluntary departure and preexamination was denied.

On March 20, 1957 plaintiff was taken into custody pursuant to an order of deportation entered on November 24, 1950.

Plaintiff's complaint was twice amended. During the pendency of this cause in the district court, plaintiff was enlarged on bail by order of this court.

A hearing was had before the court on the complaint as amended and defendant's answer thereto. The court filed findings of fact and conclusions of law, denied plaintiff's motion for a new trial and his motions to add to and amend the findings and conclusions of law.

In this court plaintiff argues that the Board did not have power to enter its order of December 26, 1947. However, it is conceded by plaintiff, in his brief herein, that the determination that plaintiff was not eligible for stay of deportation[1] or any other discretionary relief was also before the Board for consideration. It is significant that at the time the order of December 26, 1947 was entered, plaintiff's appeal to the Board included a review of the denial of his applications for discretionary relief. It is evident that the Board believed that, inasmuch as the record before it showed possible association by plaintiff with a proscribed organization, the record thereof should be made complete so that the entire matter could be disposed of at one time.

This ruling was within the jurisdiction of the Board. Having the duty to grant or deny plaintiff's application for suspension of deportation, but having insufficient evidence to discharge that duty, the Board had no alternative but to reopen the case. As plaintiff points out, the Board is an appellate tribunal, created to decide

[1] § 19(c) Immigration Act of 1917, 39 Stat 889, as amended, 8 U.S.C.A. (1942 ed.) §155(c).

[2] 7th Proviso of § 3 of the Immigration and Nationality Act of 1917, 39 Stat., 878.

questions of law. When the facts necessary to such decision are unavailable, the Board should remand the cause for further hearings.

Plaintiff's counsel has cited no decision to the contrary. For the reasons which we have stated, we do not believe that the Board lacked power to enter the order under attack.

Plaintiff further argues that the order which "withdrew both the order and warrant of deportation then pending against plaintiff was a final order[3] and that subsequently proper administrative procedure was not followed for reopening or reconsidering said action of the Board."

The answer to this contention is, as shown by the record, that the Board's order was not intended to be and was not a final order. It adjudicated no question in the appeal from the Commissioner. It merely directed a reopening of the proceedings before the Commissioner on a single question, which the Board found from a review of the record had been raised as to plaintiff's possible affiliation with or membership in a proscribed organization. The Board stated specifically that it thought that *before passing upon the merits of this case*, the hearing should be reopened so that further evidence might be taken on this issue.

We cannot understand why plaintiff now treats the December 26, 1947 action of the Board as a final order, when it therein in effect disclaimed that it thereby was passing upon the merits of the case. We hold that it was not a final order.

Plaintiff also argues that the fact that the hearing of July 24, 1946 was held in a prison where plaintiff was incarcerated undoubtedly hampered the preparation of his defense and limited his choice of counsel. From this he concludes that "due process was indeed strained". There is no showing that conditions in the prison ham-

[3] He relies upon § 90.11 Chap. 1, Title 8, 1947 Supplement, Code of Federal Regulations.

pered plaintiff in the preparation of his defense or in any other manner.

Plaintiff seeks to show that a statement dated August 16, 1944, which he signed "Steve Tandaric, Steve Fenric, Emil Tandaric, Robert Bob Rebic", the latter three being aliases, should not have been placed in evidence at the hearing held July 24, 1946, because,

> "'. . . Whenever a recorded statement is to be obtained from a person under investigation, he shall be warned that any statement made by him may be used as evidence in any subsequent proceedings.' 8 CFR 150.1(c), 1947 Supp."
>
> "'. . . An affidavit of an inspector as to statements made by the alien or any other person during an investigation may be received in evidence, otherwise than in support of the testimony of the inspector, only if the maker of such statement is unavailable or refuses to testify at the warrant hearing or gives testimony contradicting the statement and the inspector is unavailable to testify.' 8 CFR 150.6(i), 1947 Supp."

There is no evidence in the record that plaintiff was not warned as provided by § 150.1(c). More important is the fact that sufficient evidence, other than the 1944 statement, was introduced against plaintiff at the 1946 hearing. In addition a mere reading of § 150.6(i) shows that it does not apply to the statement of plaintiff bearing his signature. The document is not an affidavit of an inspector.

We shall not extend this opinion by a detailed recital of a number of ingenious, baseless, and, in some instances, frivolous contentions made by plaintiff. Neither singly nor collectively do they tend to show that the order of deportation is not supported by proper evidence or that it is arbitrary and capricious, thus violating plaintiff's right to due process under the Fifth Amendment to the constitution of the United States.

For all of the reasons hereinbefore set forth the judgment of the district court is affirmed.

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FILED
DEC 22 1958
JAMES R. BROWNING, Clerk

No. 533

In the Supreme Court of the United States

OCTOBER TERM, 1958

STEVE TANDARIC, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT ROBERT H. ROBINSON, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, IN OPPOSITION

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Solicitor General,
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Assistant Attorney General,
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OPINIONS BELOW

The opinion of the Court of Appeals (3 R. 52–59; Pet. App. 5a–12a) [2] is reported at 257 F. 2d 895. The findings of fact and conclusions of law of the district court appear at 2 R. 37–40.

JURISDICTION

The judgment of the Court of Appeals was entered on August 12, 1958 (3 R. 60). A petition for rehear-

[1] The petition incorrectly lists the "United States of America" as respondent. The true respondent is "Robert H. Robinson, District Director, Chicago District, Immigration and Naturalization Service, United States Department of Justice" (see Pet. App. 1a, 5a).

[2] Volume 3 of the record is being lodged with the Clerk of this Court.

ing was denied on September 3, 1958 (3 R. 61). The petition for a writ of certiorari was filed on November 21, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioner, an alien who had legally resided in this country and who had left under a passport in which he assumed the identity of a deceased brother, was properly held deportable because he represented himself as a citizen of the United States on reentry and did not obtain an immigration visa.

2. Whether petitioner had a fair hearing.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations appear in the Appendix, *infra*, pp. 11–16.

STATEMENT

Petitioner, who was born at a place in Austria-Hungary which is now part of Yugoslavia, was legally admitted as a permanent resident of the United States on July 2, 1911, at the age of 3 (1 R. 4). He was never naturalized (2 R. 176). In 1937, he filed an application for a passport with the State Department in which he stated that he was Emil Tandarich and was born in Chicago, Illinois in 1912 (2 R. 181–182, 205–206).[1] In support, he presented a baptismal certificate which showed birth in the United States. Actually he had assumed his deceased brother's identity (2 R. 193, 205–206).[1] He left the United States and fought with the Loyalists in Spain (1 R. 4–5). Preliminary to his

[1] His brother Emil was born in this country.

return to the United States in 1939, he filed an application for registration in which he said that he was Emil Tandarich, born in Chicago in 1912 (2 R. 207–208). He then reentered the United States as Emil Tandarich, a native-born citizen. He was not in possession of a valid immigration visa and was not exempt from the presentation thereof (2 R. 202).

In December, 1944, a warrant of arrest was executed for his deportation on the grounds that he reentered the United States in 1939 not in possession of a valid immigration visa and that he admitted to having committed perjury prior to reentry (2 R. 202).

In July, 1946, an immigration hearing was held, during which petitioner testified. He admitted filing the application in which he claimed to be Emil Tandarich and claimed to be born in this country. In answer to the question whether he committed perjury in 1937, he said (2 R. 186): "I didn't think I perjured myself at the time but from the explanation I have now it would be perjury * * *." When asked if he committed perjury in 1939 before the Consular Officer at Barcelona, he said "I think I did" (2 R. 189). He said he used the name of his brother "as an expedient so as to make sure that I would get it [passport] and get back after the defeat of the Fascists of Europe" (2 R. 183).

The presiding officer found, as a result of the hearing, that petitioner was deportable (1) under the Immigration Act of 1924 on the grounds that he reentered the United States in 1939 not in possession of a valid immigration visa and was not exempted from the presentation thereof, and (2) under the

1917 Act in that he admitted to committing perjury prior to his reentry. At the same time petitioner's request for suspension or voluntary departure was denied (2 R. 169–171).

In March, 1947, the Commissioner of Immigration and Naturalization ordered the reopening of petitioner's case so that the offense of perjury could be accurately and sufficiently defined to petitioner (2 R. 160–163). The hearing was then reopened and the offense of perjury was defined to petitioner as follows: "* * * perjury is the willful and corrupt assertion of a falsehood material to the issue in the case made under oath or affirmation in the manner prescribed by the law before a person authorized to administer oaths" (2 R. 150–154). When asked if he committed perjury in 1939 before the Consular Officer at Barcelona, petitioner answered "I recognize that it amounts to perjury, but at the time action was taken, I did not think in the terms of perjury. I didn't recognize at the time that it was 'perjury.'" He said that the same answer applied to the 1937 statement (2 R. 128).

At this hearing, the government submitted in evidence a 1944 affidavit signed by petitioner in which he admitted the facts as to the application in his brother's name (2 R. 155–159). In that statement, expressing his understanding of the meaning of perjury, he said "False statement under oath" and then admitted perjury in his application for a passport in 1927 and application for registration in 1939 (2 R. 158–159). Following this hearing, the presiding inspector recommended that petitioner be deported on the same

grounds as found in the previous hearing (2 R. 123). The Acting Commissioner accepted the recommendation (2 R. 110–145).

On appeal, the Board of Immigration Appeals ordered that the hearing should be reopened (2 R. 138–139). After noting that petitioner had been held ineligible for suspension of deportation because of the admission of perjury, the Board said (2 R. 138): "We have serious doubts on the basis of the record before us, that respondent is subject to deportation on the criminal charge contained in the warrant of arrest." Since there appeared to be an issue as to affiliation with a subversive organization, the Board, before passing on the case, thought this issue should be explored. It ordered that the order and warrant of deportation be withdrawn, but it specifically said that it was not passing on the merits of the case.

A hearing was held in August, 1950 (2 R. 63–134). The hearing examiner who conducted the hearing stated at the outset that the purpose was to hear evidence on affiliation (2 R. 63) and that he had familiarized himself with the case, including the previous hearings. The hearing officer concluded that the evidence failed to show petitioner's affiliation or membership in a proscribed organization. The hearing officer did, however, concur in the earlier finding of petitioner's deportability by the presiding inspector (2 R. 62). The Assistant Commissioner of Immigration and Naturalization agreed with the recommendation and ordered petitioner's deportation (2 R. 40–47). On appeal to the Board of Immigration Appeals, the order was upheld. The Board found the

charge of entering without a visa sustained (2 R. 28). It also said (2 R. 28): "We have examined this record with great care and have read every line of testimony * * *. We have decided that respondent is guilty of perjury and that he has admitted it" (2 R. 27–31). The Board ruled that petitioner, having admitted a crime involving moral turpitude, was ineligible for suspension of deportation and that, in any event, suspension would be denied as an exercise of discretion (2 R. 31). Petitioner was finally ordered deported on March 27, 1957, and was taken into custody on March 29, 1957 (see 1 R. 31).

Petitioner initiated the present proceedings for judicial review and for declaratory and injunctive relief (1 R. 4–20). On October 8, 1957, the district court dismissed petitioner's complaint, holding that the order of deportation was supported by reasonable, substantial, and probative evidence (1 R. 37–40, 42–43). On appeal, the Court of Appeals affirmed (3 R. 60).

ARGUMENT

1. Petitioner contends that, as a nonquota immigrant under Section 4 (b) of the 1924 Act, he was not required to have an immigration visa to reenter in 1939, and that therefore his concealment of alienage in reentering in 1939 does not subject him to deportation under Sections 13 (a) and 14 of the Immigration Act of 1924 (*infra*, p. 13). This contention is without merit.

Section 13 (a) of the 1924 Act (*infra*, p. 13) specifically provides that a nonquota immigrant have a visa upon reentry. The fact that Section 13 (b)

(*infra*, p. 13) provides for the readmission "under [certain] conditions" of previously admitted aliens without a visa is of no avail to petitioner. This section on its face does not give a previously admitted alien an unqualified right to reenter. It grants a privilege of reentry without a visa only "under such conditions as may be by regulations prescribed." Petitioner did not seek readmission to this country under this section, and he cannot now claim a right to be readmitted under it. He made no attempt to conform to any of the conditions, seeking instead to conceal the fact that he was an alien and relying on his assumed citizenship and his brother's identity. Regardless of perjury, therefore, petitioner was clearly deportable as an alien who entered without a visa and without being exempt from such requirement.

Moreover, the finding that petitioner committed perjury as to a material matter was warranted. Petitioner was admitted as a citizen, thus thwarting any inquiry as to his admissibility as a alien. His knowingly false statements were made for the purpose of assuring his entry into the United States (see the Statement, *supra*). They were material on the issue of his admissibility to the United States. *Landon* v. *Clarke*, 239 F. 2d 631 (C. A. 1); *Duran-Garcia* v. *Neeley*, 246 F. 2d 287 (C. A. 5); *United States* v. *Reimer*, 96 F. 2d 217 (C. A. 2).

2. The various claims of lack of procedural due process are also without merit.

a. Petitioner's principal complaint seems to be that the Board of Immigration Appeals lacked authority

in 1947 to set aside the warrant of deportation and order an additional hearing on the question of his affiliation with a subversive organization and then to affirm the order of deportation on the basis of the evidence introduced at the prior hearings (Pet. 22-27). The Board had before it in 1947 not only the question of deportability, but the question of suspension of deportation. If petitioner were found to have committed perjury he would be ineligible for suspension of deportation, but the Board had some question as to that finding. That issue might not have to be reached, however, if petitioner proved to be a member of a subversive organization. Manifestly, it was in the power of the Board, before undertaking to pass on the case before it, to have the record complete as to all issues which had a bearing on the question of suspension which the Board was being asked to decide. The opinion of the Board directing the reopening made clear that the Board was not deciding the question of perjury. When it later became necessary to do so (there being no finding of membership in a subversive organization), the Board correctly ruled that petitioner had committed perjury.

Since the order of the Board directed the reopening for the purpose of adducing evidence on the issue of affiliation, there was no occasion to reintroduce the evidence already of record bearing upon the other issues.

b. The claim that petitioner did not receive adequate notice of the purpose of the reopened hearing because the formal notice of hearing did not specify the purpose (Pet. 22) is frivolous. The order of the

Board of Immigration Appeals had put petitioner on notice of the issue to be explored at the reopened hearing. At the outset of the reopened hearing, the presiding officer stated the purpose of the hearing and neither petitioner nor his counsel made any claim of surprise or any request for adjournment.

c. Petitioner also asserts that it was improper to introduce in evidence, at the 1947 hearings, a signed statement made by him in 1944 before a representative of the Immigration and Naturalization Service (Pet. 21). He points to the regulation (8 C. F. R. 150.1 (c) (1947 Supp.)) which provides that the person giving a recorded statement shall be warned that any statement made by him may be used as evidence in subsequent proceedings. Petitioner offered no evidence that he had not been so warned. Moreover, all the facts admitted in that statement were testified to by petitioner himself, both at the 1946 and 1947 hearings.

d. The allegation that there was error in refusing to consider and grant voluntary departure and preexamination (Pet. 18–20) is answered by the opinion of the Board of Immigration Appeals. The Board said (2 R. 31):

> In the alternative respondent has applied for a grant of voluntary departure, preexamination, and readmission under the 7th Proviso. We do have authority to grant this relief but for the same reasons that we have set forth for denying suspension of deportation we specifically deny the alternative relief. A grant of voluntary departure, preexamination, and readmission under the 7th Proviso is extraor-

dinary relief available only to one who can demonstrate merit. The respondent is not such a person.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1958.

APPENDIX

The pertinent statutes and regulations provide as follows:

Immigration Act of 1917 (39 Stat. 874):

> Section 3. That the following classes of aliens shall be excluded from admission into the United States: * * * persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude; * * *
>
> * * * * *
>
> Sec. 15. That upon the arrival at a port of the United States of any vessel bringing aliens it shall be the duty of the proper immigration officials to go or to send competent assistants to the vessel and there inspect all such aliens * * *.
>
> * * * * *
>
> Sec. 19. (a) That at any time * * * any alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude; * * * shall, upon the warrant of the Attorney General, be taken into custody and deported: * * *
>
> * * * * *

Immigration Act of 1924 (43 Stat. 153, 8 U. S. C. 201):

> Sec. 4. When used in this Act the term "non-quota immigrant" means—
>
> * * * * *
>
> (b) An immigrant previously lawfully admitted to the United States, who is returning from a temporary visit abroad;
>
> * * * * *

Sec. 8. A consular officer may, subject to the limitations provided in sections 2 and 9, issue an immigration visa to a non-quota immigrant as such, upon satisfactory proof, under regulations prescribed under this Act, that the applicant is entitled to be regarded as a non-quota immigrant.

* * * * * *

Sec. 10. (a) Any alien about to depart temporarily from the United States may make application to the Commissioner of Immigration and Naturalization for a permit to reenter the United States, stating the length of his intended absence, and the reasons therefor. Such application shall be made under oath, and shall be in such form and contain such information as may be by regulations prescribed, and shall be accompanied by two copies of the applicant's photograph.

(b) If the Commissioner of Immigration and Naturalization finds that the alien has been legally admitted to the United States, and that the application is made in good faith, he shall, with the approval of the Attorney General, issue the permit, specifying therein the length of time, not exceeding one year, during which it shall be valid. The permit shall be in such form as shall be by regulations prescribed and shall have permanently attached thereto the photograph of the alien to whom issued, together with such other matter as may be deemed necessary for the complete identification of the alien.

(c) On good cause shown the validity of the permit may be extended for such period or periods, not exceeding six months each, and under such conditions, as shall be by regulations prescribed.

(d) For the issuance of the permit, and for each extension thereof, there shall be paid a fee of $3, which shall be covered into the Treasury as miscellaneous receipts.

(c) Upon the return of the alien to the United States the permit shall be surrendered to the immigration officer at the port of inspection.

(f) A permit issued under this section shall have no effect under the immigration laws, except to show that the alien to whom it is issued is returning from a temporary visit abroad; but nothing in this section shall be construed as making such permit the exclusive means of establishing that the alien is so returning.

* * * * *

SEC. 13. (a) No immigrant shall be admitted to the United States unless he (1) has an unexpired immigration visa or was born subsequent to the issuance of the immigration visa of the accompanying parent; (2) is of the nationality specified in the visa in the immigration visa; (3) is a nonquota immigrant if specified in the visa in the immigration visa as such; (4) is a preference-quota immigrant if specified in the visa in the immigration visa as such; and (5) is otherwise admissible under the immigration laws.

(b) In such classes of cases and under such conditions as may be by regulations prescribed immigrants who have been legally admitted to the United States and who depart therefrom temporarily may be admitted to the United States without being required to obtain an immigration visa.

* * * * *

SEC. 14. Any alien who at any time after entering the United States is found to have been at the time of entry not entitled under this Act to enter the United States, or to have remained therein for a longer time than permitted under this Act or regulations made thereunder, shall be taken into custody and deported * * *.

* * * * *

SEC. 25. The provisions of this Act are in addition to and not in substitution for the pro-

visions of the immigration laws, and shall be enforced as a part of such laws, and all the penal or other provisions of such laws, not inapplicable, shall apply to and be enforced in connection with the provisions of this Act. An alien, although admissible under the provisions of this Act, shall not be admitted to the United States if he is excluded by any provision of the immigration laws other than this Act, and an alien, although admissible under the provisions of the immigration laws other than this Act, shall not be admitted to the United States if he is excluded by any provision of this Act.

* * * * * *

8 C. F. R. (1947 Supp.) 132.P:

Aliens returning to unrelinquished domicile, domicile defined. Aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Attorney General and under such conditions as he may prescribe. In such case satisfactory proof of domicile in the United States for seven consecutive years, and of departure therefrom with the intention of returning thereto, will be exacted. Every case of exclusion for any cause in which the alien has given such proof, shall be promptly brought by the official in charge to the attention of the Attorney General, through the usual official channels, with a complete report of the reasons for the alien's exclusion and of the proof which has been offered of continuous and unrelinquished domicile, together with a statement of the duration of the absence. Domicile, for the purposes of this section, means that place where a person has his true, fixed, and permanent home, and principal establishment, to which, whenever he is absent, he has the intention of returning.

* * * * * *

8 C. F. R. (1947 Supp.) 164.1:

Qualifications. Any alien who is a lawful permanent resident of the United States and who is about to depart temporarily therefrom may make application for a permit to reenter the United States.

8 C. F. R. (1947 Supp.) 164.2:

Application; form; fee. The application for a permit to reenter the United States shall be made, under oath, on Form I-131, which may be obtained from any office of the Immigration and Naturalization Service, and should be submitted at least 30 days before the proposed date of departure, to the Commissioner of Immigration and Naturalization or to the immigration and naturalization office prescribed in § 60.30 (a) of this chapter. A separate application must be made for each applicant. A parent or guardian may file an application in behalf of a child who is under the age of 14 years. Each application shall be accompanied by the statutory fee of $3, remitted as prescribed in § 60.30 (b) of this chapter. Each application shall also be accompanied by two photographs of the applicant, which shall meet the specifications in § 364.1 of this chapter. The application shall include—(a) name currently used; (b) time, place, and manner of last recorded arrival in the United States; (c) name used at time of entry; (d) father's name and mother's maiden name; (e) age, marital status, and occupation at time of entry; (f) place and date of birth; (g) last permanent residence and name and address of nearest relative in country whence alien came; (h) name and address of person to whom destined at time of last entry; (i) personal description as of date of filing application; (j) by whom accompanied at time of last entry; (k) address in the United States, and what temporary ad-

dress abroad will be; (l) marital status at the date of filing application, and if married the name and address of husband or wife; (m) nature of business or employment and name of employer; (n) port and date of proposed departure, name of vessel on which sailing, length of proposed absence, and reasons for going abroad.

* * * * *

8 C. F. R. (1947 Supp.) 164.4:

* * * (a) If the Commissioner of Immigration and Naturalization finds that the applicant has the qualifications specified in § 164.1 and that the application is made in good faith, he shall issue the permit and it shall be valid for the time therein specified, not to exceed one year. Such permit will, however, have no effect under the immigration laws except to show that the alien to whom it is issued is returning from a temporary visit abroad.

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